

Litigation Update

California Indian Law Association's Annual Conference
October 12, 2018

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Morongo Band of Mission Indians**

Today's Discussion

1. Introduction and Summary of *Texas v. Zinke*
2. Ways to Influence ICWA Narrative
3. Questions

Texas v. Zinke

Chad Brackeen, et al. v Ryan Zinke, et al., Case No. 4:17-cv-00868-o; Northern District of Texas Fort Worth Division

- 2016 ICWA Regulations Violate the APA
- ICWA & Regulations violate the 10th Amendment because the federal government cannot regulate state adoption and foster care placements.
- ICWA is unconstitutional because it violates the equal footing doctrine and full faith and credit clause of the Constitution.
- ICWA is unconstitutional because the Indian commerce clause does not provide Congress with authority to pass ICWA.
- ICWA is unconstitutional because it violates the guarantee clause of the Constitution
- ICWA is constitutional because it interferes with family's substantive due process rights to a familial relationship with their foster children
- ICWA's placement preferences are discriminatory against non-Indians and in violation of equal protection under the 5th Amendment.
- ICWA is unconstitutional because it is an abuse of Congress' spending clause power.
- ICWA is unconstitutional because it violates the Constitution's separate of powers.

Texas v. Zinke - Original Parties

- **Individuals**

- Chad and Jennifer Brackeen, wishing to adopt a two-year-old boy (Texas)
- Nick and Heather Libretti, wishes to adopt a twenty-month old girl (Nevada)
- Jessica and Danielle Clifford, wishing to adopt a six year old girl (Minnesota)
- Altagracia Socorro Hernandez, biological mother of the child the Libretti's wish to adopt

- **States**

- Texas
- Louisiana
- Indiana

Texas v. Zinke - Intervening Parties

- Cherokee Nation, Oneida Nation, Quinault Indian Nation, Morongo Band of Mission Indians (granted March 28, 2018)
- (Limited to Seeking Dismissal) Navajo Nation (denied June 1, 2018)

Texas v. Zinke – Named Defendants

- Secretary of Interior Ryan Zinke
- Director of the BIA, Bryan Rice
- Acting Assistant Secretary for Indian Affairs the BIA, John Tahsuda, III
- Bureau of Indian Affairs
- Department of the Interior
- Secretary of HHS Alex M. Azar II (on Second Amended Complaint)
- Department of Health and Human Services (on Second Amended Complaint)

Texas v. Zinke – Amicus Curiae

- State of Ohio
- Goldwater Institute
- Indian Law Scholars
- Gila River Indian Community
- States of California, Alaska, Montana, New Mexico, Oregon, Utah and Washington
- 123 Federally Recognized Indian Tribes (NCAI Amicus)

Case History

- **October 2017:** State Plaintiffs (Texas, Indiana and Louisiana) and Individual Plaintiffs (the Brackeens, Librettis, Cliffords, and Ms. Hernandez) brought a case to the U.S. District Court for the Northern District Texas in Fort Worth arguing that the Indian Child Welfare Act (ICWA) and the 2016 BIA ICWA Regulations are unconstitutional and enforceable.
- **February 2018-March 2018:** Parties filed cross Motions to Dismiss
 - Morongo Intervened on March 26, 2018 (along with Cherokee Nation, Quinault, and Oneida) April 2018: Parties filed cross Motions for Summary Judgement
- **May 2018:** Parties filed additional briefs “answering” opposing parties
- **April – May 2018:** Multiple outside entities and groups filed amicus briefs
- **July 2018:** Judge denied Defendants’ Motion to Dismiss and ordered hearing on Plaintiffs’ Motions for Summary Judgement, heard on August 2, 2018 in Fort Worth, TX
- **October 4, 2018:** Order for Summary Judgement in favor of Plaintiffs
- **October 10, 2018:** Tribal Defendants filed a Motion to Stay Pending Appeal

Order for Summary Judgement

In the Court's Final Judgement, the Court declared that 25 U.S.C. §§ 1901-23, 25 U.S.C. §§ 1951-52; 25 C.F.R. §§ 23.106-22, 25 C.F.R. §§ 23.124-32, and 25 C.F.R. §§ 23.140-41 are unconstitutional. Those citations are summarized below.

25 U.S.C. §§ 1901-23	ICWA Subchapter I – Child Custody Proceedings (e.g. Indian tribe's exclusive jurisdiction over child custody proceedings, transfer of proceedings to tribal court, active efforts, placement preferences, QEW requirements, notice requirements)
25 U.S.C. §§ 1951-52	ICWA Subchapter III – Recordkeeping (e.g. final orders send to Secretary of Interior, disclosure of information for enrollment purposes)
25 C.F.R. §§ 23.106-22	(ICWA Regulations – General Provisions, Pretrial Requirements, Petitions to Transfer to Tribal Court, Adjudication of Involuntary Proceedings)
25 C.F.R. §§ 23.124-32	(ICWA Regulations – Voluntary Proceedings, Dispositions)
25 C.F.R. §§ 23.140-41	(ICWA Regulations – Recordkeeping, Information States must Furnish and Maintain)

Fifth Amendment Equal Protection Claim

Summary of Judge O'Connor's ruling:

ICWA's membership eligibility standard for an Indian child does not rely on actual tribal membership, instead, it defines an Indian child as one is who a member "of an Indian tribe" as well as those children simply *eligible* for membership who have a biological Indian parent. This means one is an Indian child if the child is related to a tribal ancestor by blood. By deferring to tribal membership eligibility standards based on ancestry, rather than actual tribal affiliation, the ICWA's definition of "Indian children" uses ancestry as a proxy for race, is a racial classification, and must be analyzed according to strict scrutiny – which it does not meet. Therefore, ICWA is unconstitutional.

Article I Non- Delegation Claim

Summary of Judge O'Connor's ruling:

Article I of the Constitution vests all legislative powers to the US Congress. ICWA's placement preferences grant Indian tribes the authority to reorder congressionally enacted adoption placement preferences by tribal decree and then apply their preferred order to the states. Indian tribes' power to change specifically enacted Congressional priorities and impose them on third parties (States) can only be described as a legislative power. Further, the Constitution does not permit Indian tribes to exercise federal legislative or executive regulatory power over non-tribal persons on non-tribal land, and therefore Congress cannot delegate its inherent legislative authority to Tribes through ICWA. Therefore, ICWA and the Final Rule are unconstitutional.

Tenth Amendment Anti- Commandeering Claim

Summary of Judge O'Connor's ruling:

ICWA offends the structure of the Constitution by overstepping the division of federal and state authority over Indian affairs by commanding States to impose federal standards in state created causes of action. Because ICWA only applies in custody proceedings arising under state law, it appears to the public as if state courts or legislatures are responsible for federally-mandated standards, meaning "responsibility is blurred." ICWA also shifts the costs of regulations to the States by giving the sole power to enforce a federal policy to the States. ICWA, on its face, is a direct command from Congress to the States. No provision in the Constitution grants Congress the right to issue direct orders to the governments of the States, including the Commerce Clause. Therefore, ICWA is unconstitutional.

Administration Procedures Act Claims

Summary of Judge O'Connor's ruling:

The Final Rule is unconstitutional because it (1) purports to implement an unconstitutional law and therefore must be vacated, (2) exceeds the scope of Interior's statutory regulatory authority under ICWA, (3) reflects an impermissibly ambiguous construction of ICWA, and (4) is otherwise arbitrary and capricious.

Indian Commerce Clause Claim

Summary of Judge O'Connor's ruling:

The Supreme Court previously ruled that Congress is not permitted to directly command the States, even when it relies on Commerce Clause power. Congress did not have the constitutional authority to pass ICWA under the Indian Commerce Clause. Therefore, ICWA is unconstitutional.

**Not Just A
Courtroom Fight.
Not Just An ICWA
Case.**

#ProtectTribalFamilies

Lessons Learned

Adoptive Couple v. Baby Girl



Lexi Case



“Indian Country absolutely should be terrified”

If ICWA is struck down as a “race-based” law, by extension — “the Indian Gaming regulatory Act would be unconstitutional. The Interior Department’s process through which tribes acquire land in trust, that would be unconstitutional. All the healthcare that the Federal government funds, unconstitutional. All the money that the federal government gives to tribes to run self governance, unconstitutional,” says Fletcher. “Everything would go down.”

- Matthew FletcherMatthew Fletcher, citizen of Grand Traverse Band of Ottawa and Chippewa Indians and professor of law at Michigan State University
- https://newsmaven.io/indiancountrytoday/news/texas-judge-rules-indian-childhood-welfare-act-icwa-as-unconstitutional-X_4Gx2-lkEKVEYCEdGxSFg/

The Story So Far...

- https://www.washingtonpost.com/news/morning-mix/wp/2018/10/10/court-strikes-down-native-american-adoption-law-saying-it-discriminates-against-non-native-americans/?utm_term=.0c0f29659e01
- <https://chronicleofsocialchange.org/featured/indian-child-welfare-act-fire-federal-judge-strikes-law-aimed-ending-separation-native-children-families-tribes>
- https://www.wacotrib.com/federal-judge-in-texas-strikes-down-indian-child-welfare-act/article_ff150b9f-63eb-5061-9f88-06be82aa50d6.html
- <https://www.law360.com/articles/1089827/indian-child-welfare-act-found-unconstitutional>
- <https://www.indianz.com/News/2018/10/05/judge-strikes-down-indian-child-welfare.asp>
- <https://turtletalk.wordpress.com/2018/10/05/federal-judge-rules-icwa-unconstitutional-in-brackeen-v-zinke/>
- <https://turtletalk.wordpress.com/2018/10/05/tribes-statement-re-brackeen-v-zinke-decision/>
- <https://nativenewsonline.net/currents/gop-appointed-federal-district-judge-strikes-down-indian-child-welfare-act/>
- <https://dallastimesherald.com/federal-judge-in-texas-strikes-down-indian-child-welfare-act/>

Questions?

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